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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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Washington, [illegible]20536

FEB 06 2004

FILE: WAC-02-138-51423 OFFICE: CALIFORNIA SERVICE CENTER DATE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an employment services and placement company that seeks to employ the beneficiary as a rehabilitation services coordinator. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the petitioner failed to provide sufficient evidence to establish that (1) it was an employer as defined at 8 C.F.R. § 214.2(h)(4)(ii); (2) the labor condition application (LCA) was valid; and (3) the beneficiary is qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional evidence.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;

(3) Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section states that:

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United

States agent is subject to the following conditions:

> (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
>
> (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of employment and to provide any required documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as a rehabilitation services coordinator. Evidence of the beneficiary's duties in the record includes: the I-129 petition; the petitioner's document entitled "Detailed Description of the Position's Tasks and Duties"; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing, implementing, coordinating and evaluating patient rehabilitation programs; functioning as a liaison among families, patients, physicians, and therapists; evaluating and monitoring patients' progress and redesigning programs to suit patients' needs; and coordinating pre-admission procedures. The petitioner indicated that qualified candidates must possess bachelor's degrees in nursing, physical therapy, psychology, occupational therapy, or health sciences.

The director denied the petition, finding that the petitioner did not establish: (1) it would be the employer or agent of the beneficiary; (2) the validity of the labor condition application (LCA); and (3) the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel states that the petitioner intends to employ the beneficiary as a rehabilitation services coordinator with [redacted]. Counsel avers that the submitted agreements indicate that the beneficiary is offered a rehabilitation services coordinator position. Counsel states that the error in the job description was remedied by the addendum. Furthermore, counsel maintains that the petitioner is the beneficiary's employer because: (1) the agreement between the petitioner and the beneficiary states this; (2) the petitioner would pay the beneficiary's wages and have authority to hire and fire the beneficiary; and (3) although the beneficiary would be physically located at the client site, the petitioner would monitor and supervise the beneficiary's daily performance.

According to the evidence in the record, the petitioning entity does not satisfy the definition of a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The documentary evidence contained in the record reveals that, along with the I-129 petition, filed on March 18, 2002, the petitioning entity submitted the following documents:

- the "California Subscriber Service Agreement," executed on February 22, 2002, between the petitioner and Balanza Homes LLC;
- the "Exhibit B," the addendum to the California Subscriber Service;
- the "Agreement," executed on February 8, 2002, between Balanza Homes LLC and the petitioner;
- the "LCA."

In response to the request for evidence, the petitioner submitted the following documents:

- the "Agreement" along with documents entitled "Exhibit B," "Addendum Exhibit B," and "Exhibit A", with the execution date of January 31, 2002, between Balanza Homes LLC and the petitioner;
- the "Employment Contract," dated January 31, 2002, between the petitioner and the beneficiary.

Whether the petitioner is considered a United States employer turns on the language contained in the Agreements and the California Subscriber Service Agreement and the accompanying addendum and exhibits. The AAO will first consider the Agreement, executed on

February 8, 2002, because it accompanied the initial I-129 petition. This Agreement states that the petitioner would be known as the "job placement agency" and [redacted] would be known as the "employer," and the Agreement states, in part, that the employer agrees to:

> engage the services of the job placement agency to find, pre-qualify, interview, evaluate, and process the application and other pertinent employment and legal document of the applicant for the purpose of lawful, gainful and equitable employment.

The Agreement further states that the employer agrees to hire the beneficiary for the position of rehabilitation services coordinator after the completion of document processing. In the Agreement, the employer (Balanza Homes, LLC) guarantees the continuous employment of the beneficiary from April 1, 2002 to March 31, 2005; specifies the hourly salary that would be paid; indicates the job location; and states "for [its] services, the job placement agency shall be compensated by the employer the amount of equivalent to one month['s] salary."

The AAO now considers the second Agreement, submitted in response to the request for evidence, with the execution date of January 31, 2002. The language of this Agreement differs dramatically from the first Agreement. Here, the petitioner is known as "the employment agency," and [redacted] as the "employer." In this Agreement, it is the employment agency (the petitioner) that guarantees the continuous employment of the beneficiary. And, this Agreement introduces additional language that is absent in the initial Agreement. The additional language states:

> The Employment [A]gency shall be responsible for the performance evaluation of the employee and shall make recommendations to management[,] accordingly. The Agency shall also be responsible for terminating the employee's services, based on grounds or reasons contained in the Agency's personnel policy manual.

The language of the two Agreements is plainly and fundamentally inconsistent. Given such profound differences between the two Agreements, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, the evidentiary value of all evidence contained in the record is highly questionable. With this in mind, the AAO will proceed with

discussing counsel's assertion that the petitioner would be the beneficiary's employer.

The language of the Agreement, executed on February 22, 2002, refutes counsel's assertion that the petitioning entity would be the beneficiary's employer. First, the language in the Agreement plainly states that the employer, [redacted] would hire the beneficiary and pay the beneficiary's salary; this undermines counsel's assertion that the petitioner would have the sole responsibility to hire and compensate the employee. Second, the explicit language of the Agreement, that the petitioner would be known as the "job placement agency" and Balanza Homes LLC as the "employer," evinces that the petitioning entity serves as a placement agency, not an employer. Third, the language in the Agreement, that the job placement agency shall be compensated in the amount equivalent to one month's salary for its services, obviously implies that the petitioning entity functions as a placement agency that receives a fixed fee for its services, and that the petitioning entity would relinquish all control over and responsibility for the beneficiary following the beneficiary's placement with a company. Thus, the petitioner would not hire, pay, fire, supervise, or otherwise control the work of the beneficiary as required by the regulations at 8 C.F.R. § 214.2(h)(4)(ii).

In conclusion, the petitioning entity fails to establish that it would be the beneficiary's employer as required by the regulations.

Because the petitioner failed to establish that it would be the beneficiary's employer, this proceeding will not discuss whether the LCA is valid and whether the beneficiary is qualified to perform the duties of the offered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.